

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 8, 2008 Session

JAMES MICHAEL BROWN v. HEIDI SUE (BROWN) LAMOUREUX

**Appeal from the Chancery Court for Cheatham County
No. 9387C Leonard W. Martin, Judge**

No. M2007-00123-COA-R3-PT - Filed April 30, 2008

Father appeals the trial court's modification of parenting time. Subsequent to the parties' divorce, Mother was designated as the primary residential parent. Father filed a petition seeking to modify such designation, which the trial court granted. In the order, Father was designated as the child's primary residential parent, and the issue regarding Mother's parenting time was expressly reserved pending family counseling. Five months later, Mother filed a petition seeking to be designated as the primary residential parent of the child. Following a hearing on her petition, the trial court denied her request to be the primary residential parent, but it granted Mother ninety-seven days of parenting time. Father appeals contending the trial court erred by granting Mother any relief. We have determined that the first of the two orders, the one in which the court reserved the issue of Mother's parenting time, was not a final order because all issues had not been resolved. Therefore, the first order was an interlocutory order, which was subject to modification by the trial court without proof of a material change of circumstance. Finding no error with the trial court's decision to award Mother ninety-seven days of parenting time, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY BENNETT, J., joined.

Brenda Rhoton Clark, Nashville, Tennessee, for the appellant, James Michael Brown.

Nick Perenich, Nashville, Tennessee, for the appellee, Heidi Sue (Brown) Lamoureux.

MEMORANDUM OPINION¹

James Michael Brown (“Father”) and Heidi Sue Lamoureux (“Mother”) were granted a divorce in the summer of 2005.² Pursuant to the divorce decree, the court designated Mother as the primary residential parent of the parties’ ten year-old son, Matthew.³

Subsequently, Father filed a Petition to Modify Custody of Matthew, which the trial court heard in September of 2005. On September 30, 2005, the trial court designated Father as the primary residential parent and designated Mother as the alternate residential parent; however, the court did not grant Mother any parenting time. Instead, it reserved the issue of Mother’s parenting time “pending family counseling.” Although a date was not set to review the issue, it was contemplated that Mother’s parenting time would be established in the near future.

After the trial court entered its Order of September 30, Mother attended one counseling session with Matthew, but failed to attend counseling with the rest of the family as ordered by the trial court.

Five months later, and before the family had completed counseling, Mother filed a petition in which she requested, *inter alia*, that the trial court designate her as Matthew’s primary residential parent. The trial court conducted a hearing on Mother’s petition in July of 2008. Thereafter, the trial court denied Mother’s request to be designated as the primary residential parent for Matthew; however, the court awarded Mother ninety-seven days of parenting time each year. This appeal followed.

STANDARD OF REVIEW

The designation of a primary residential parent as well as each parent’s respective parenting time with the children lies within the broad discretion of the trial judge, *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988); *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973), and the trial court’s decision regarding such matters will not be reversed absent an abuse of that discretion. *Eldridge*, 42 S.W.3d at 85; *Suttles*, 748 S.W.2d at 429; *Edwards*, 501 S.W.2d at 291.

¹Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

²The record does not contain the Divorce Decree. Accordingly, the actual date of the parties’ divorce is unknown.

³The parties had three children; however, only one of the children is at issue in this appeal.

The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *Eldridge*, 42 S.W.3d at 85 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)). Pursuant to the abuse of discretion standard, the trial court's ruling will be upheld "so long as reasonable minds can disagree as to propriety of the decision made." *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)). A trial court abuses its discretion if it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

ANALYSIS

Father contends the trial court erred in granting parenting time to Mother because Mother failed to prove a material change of circumstances. Father's argument is based on the mistaken premise that Mother was required to prove the existence of a material change of circumstances. We have determined she was not required to prove a material change of circumstances because the September 30, 2005 Order she sought to modify was not a final order.

A trial court's order does not constitute a final appealable order until the court has adjudicated all the claims or the rights and liabilities of all the parties at issue. *See Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). An order that constitutes a final order must fully and completely define the parties' rights with regard to all of the issues, leaving nothing else for the trial court to decide. *Id.* (citing *State ex rel. McAllister v. Goode*, 968 S.W.2d 834 (Tenn. Ct. App. 1997; *Vineyard v. Vineyard*, 170 S.W.2d 917, 920 (Tenn. Ct. App. 1942); RESTATEMENT OF JUDGMENTS § 41, cmt. a (1942)). Conversely, an order that adjudicates an issue preliminarily is an interim or interlocutory order. *Id.*

Unless and until an order or judgment becomes final, "it remains within the court's control and may be modified any time prior to the entry of a final judgment." *Hoalcraft*, 19 S.W.3d at 827 (citing *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 328 (Tenn. 1982)); *see Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983) (noting that an interlocutory order "can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties"); *see also Winter v. Smith*, 914 S.W.2d 527, 535 (Tenn. Ct. App. 1995) (stating that an interlocutory order is "subject to revision by the trial court any time prior to the entry of a final judgment adjudicating all the claims raised").

In the present matter, the parties litigated the issue of parenting time on September 21, 2005, during the hearing on Father's petition to modify custody; however, the trial court did not resolve all issues because it did not make a final determination as to Mother's parenting time. As the Order expressly provided, "[t]he issue of visitation shall be reserved pending family counseling with Mother, Father, Kayla, Michael and Matthew."⁴ Because the trial court had not yet fully adjudicated the issue of parenting time, the Order of September 30, 2005, was not a final order. Thus, the Order was subject to the trial court's modification at any time. *See Hoalcraft*, 19 S.W.3d at 827; *Stidham*,

⁴Kayla and Michael are the parties' other two children, but the parents' respective rights as to these two children are not at issue on appeal.

643 S.W.2d at 328; *Fox*, 657 S.W.2d at 749; *Winter*, 914 S.W.2d at 535. Therefore, Mother did not have to establish a material change of circumstance to be entitled to a modification of the September 2005 Order.

The September 2005 interlocutory order contemplated the subsequent filing of a motion to set Mother's parenting time. For reasons unexplained by the record, Mother elected to file a petition rather than a motion to request a modification of the previous order. In her petition, Mother asked to be designated as the primary residential parent (stating she wanted to modify custody); however, she did not expressly request "parenting time." Although the petition did not expressly request "parenting time," implicit in such a request, especially in a case where the petitioner has no parenting time, is a request for parenting time. Mother should have filed a motion instead of a petition; nevertheless, the filing of the petition afforded Father more procedural safeguards than he would have been afforded had she merely filed a motion. Accordingly, we will review the matter as though Mother filed a timely motion to, *inter alia*, award her parenting time.

Although a parent's residential time "may be limited, or eliminated, if there is definite evidence that to permit . . . the right would jeopardize the child, in either a physical or moral sense," reasonable parenting time for the non-residential parent is clearly favored. *Suttles*, 748 S.W.2d at 429 (quoting *Weaver v. Weaver*, 37 Tenn. App. 195, 261 S.W.2d 145, 148 (1953)). Moreover, absent a finding that visitation of the alternate parent would result in physical or emotional harm, "the public policy of this state is that the court *shall* 'grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship.'" *Helson v. Cyrus*, 989 S.W.2d 704, 707 (Tenn. Ct. App. 1998) (quoting Tenn. Code Ann. § 36-6-301).

In the present matter, the trial court did not find that Mother's visitation rights would result in emotional or physical harm. To the contrary, the trial court found that both Father and Mother love Matthew and want him to do well. Furthermore, the trial court found that it was in the best interest of Matthew to have a relationship with both parents and their families, and Mother was granted ninety-seven days of visitation each year. We find no error with this decision.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, James Michael Brown.

FRANK G. CLEMENT, JR., JUDGE